

# **EXHIBIT B**

1  
2 UNITED STATES BANKRUPTCY COURT  
3 SOUTHERN DISTRICT OF NEW YORK

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4 In re: Chapter 11

5 GAWKER MEDIA LLC, et al., Case No. 16-11700  
6 (SMB)

7 Debtors.

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8  
9 DATE: November 15, 2017

10 TIME: 10:01 A.M.

11  
12 DEPOSITION of CHAD E. MILTON, taken  
13 by the Plaintiff, pursuant to Subpoena and to  
14 the Federal Rules of Civil Procedure, held at  
15 the offices of Golenbock Eiseman Assor Bell &  
16 Peskoe, 711 Third Avenue, New York, New York  
17 10017, before Robert X. Shaw, CSR, a Notary  
18 Public of the State of New York.  
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<p style="text-align: right;">Page 2</p> <p>1 2 A P P E A R A N C E S: 3 4 HARDER MIRELL &amp; ABRAMS, LLP Attorneys for Plaintiff 132 S. Rodeo Drive, Fourth Floor 5 Beverly Hills, California 90212 BY: DILAN A. ESPER, ESQ. 6 -and- 7 GOLENBOCK EISEMAN ASSOR BELL &amp; PESKOE, LLP Attorneys for Plaintiff 8 Pregame LLC 711 Third Avenue 9 New York, New York 10017 BY: MICHAEL S. WEINSTEIN, ESQ. 10 212.907.7347 desper@hmafirm.com 11 mweinstein@golenbock.com 12 13 SAUL EWING ARNSTEIN &amp; LEHR LLP Attorneys for Ryan Goldberg 14 1037 Raymond Boulevard, Suite 1520 Newark, New Jersey 07102 15 BY: DIPESH PATEL, ESQ. dipesh.patel@saul.com 16 973.286.6713 17 WILLIAMS &amp; CONNOLLY, LLP Attorneys for Ryan Goldberg 18 725 12th Street, N.W. Washington, D.C. 20005 19 BY: THOMAS G. HENTOFF, ESQ. 20 GIZMOD0 MEDIA GROUP BY: LYNN OBERLANDER, ESQ. 21 EVP and General Counsel 646.214.7898 22 23 * * * 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 Chad E. Milton 2 a dispute between two parties of which I had 3 information, but I've forgotten what it was. 4 Q. Do you remember what type of 5 insurance it was? 6 A. It was media liability insurance. 7 Q. And was the underlying claim a 8 defamation claim? 9 A. I don't remember. 10 Q. Okay. I'm going to go through a 11 few of the ground rules of the deposition. 12 First of all, you're allowed to 13 take a break whenever you want to. This is a 14 deposition, not an inquisition. If you need 15 to, at any point in time, just let me know. 16 A. Okay. Thank you. 17 Q. Remember to let me finish each 18 question before starting your answer. I'll 19 try and let you finish your answer before 20 starting the next question; that will allow 21 the court reporter we've just been talking 22 about to have a clear record, which is what 23 we want. Do you understand that? 24 A. I do understand it. Thank you. 25 Q. And do you understand that you are</p>
<p style="text-align: right;">Page 3</p> <p>1 Chad E. Milton 2 C H A D E. M I L T O N, called as a 3 witness, having been first duly sworn by a 4 Notary Public of the State of New York, was 5 examined and testified as follows: 6 EXAMINATION BY 7 MR. ESPER: 8 Q. Please state your name for the 9 record. 10 A. Chad E. Milton. 11 Q. What is your address? 12 A. 8821 Alhambra Street, Shawnee 13 Mission, Kansas 66207 14 Q. Good morning, Mr. Milton. 15 A. Good morning. 16 Q. Have you ever had your deposition 17 taken before? 18 A. Yes. 19 Q. How many times? 20 A. Once. 21 Q. Okay. What was the occasion for 22 that? 23 A. I really don't recall the 24 circumstances. I was a fact witness in a, 25 involving an insurance policy, and there was</p>	<p style="text-align: right;">Page 5</p> <p>1 Chad E. Milton 2 under the same oath that you would be under 3 in a court of law and you have the same 4 obligation to give the most truthful and 5 correct testimony you can? 6 A. Yes, I understand that. 7 Q. Okay. 8 Who has employed you in this case? 9 A. I was retained, I was engaged by a 10 law firm to, and asked to come as an expert 11 witness. 12 Q. Which law firm? 13 A. Well, my -- most of my dealings 14 were with the Saul Ewing law firm. 15 Q. Okay. Did you have any 16 communications, Yes or No, with Ropes &amp; Gray? 17 A. No. 18 Q. Okay. And did you have any 19 communications with Mr. Hentoff's office? 20 A. Yes, I did. 21 Q. Okay. How much are you being 22 compensated? 23 A. \$300 an hour. 24 Q. And how many hours about have you 25 worked on this so far?</p>

<p style="text-align: right;">Page 6</p> <p>1 Chad E. Milton</p> <p>2 A. Six or seven.</p> <p>3 Q. Okay. Have you ever been an expert</p> <p>4 witness before?</p> <p>5 A. No.</p> <p>6 Q. Okay. Now, you went into an</p> <p>7 extensive discussion of your professional</p> <p>8 background in your declaration and I</p> <p>9 appreciate that;</p> <p>10 MR. ESPER: So, let's go ahead and</p> <p>11 mark that as an exhibit. We'll call it</p> <p>12 Exhibit 5.</p> <p>13 (Milton Exhibit 5, expert</p> <p>14 declaration of Chad E. Milton, marked</p> <p>15 for identification as of this date.)</p> <p>16 Q. I'm handing you Exhibit 5.</p> <p>17 Please turn to paragraph 2 of your</p> <p>18 declaration on page 2.</p> <p>19 A. Okay.</p> <p>20 Q. How long did you practice law?</p> <p>21 A. I was first admitted to the bar in</p> <p>22 Colorado in 1974, and practiced law for two</p> <p>23 years as a deputy state public defender</p> <p>24 there.</p> <p>25 Since then, I have never been in</p>	<p style="text-align: right;">Page 8</p> <p>1 Chad E. Milton</p> <p>2 description was when you worked as a claims</p> <p>3 attorney?</p> <p>4 A. The job of claims attorney is to</p> <p>5 represent the insurance company in the</p> <p>6 management of claims. In this context -- in</p> <p>7 some contexts something like that can be</p> <p>8 viewed as an adjuster.</p> <p>9 In the context of media liability</p> <p>10 insurance, all of the claims are litigated;</p> <p>11 so, the function of the claims attorney is to</p> <p>12 manage that litigation for the insurance</p> <p>13 company.</p> <p>14 Q. Were you involved in the decisions</p> <p>15 to undertake a duty to defend or contest a</p> <p>16 duty to defend in cases?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And were you involved in the</p> <p>19 decision as to whether the insurance company</p> <p>20 would reserve rights when it undertook the</p> <p>21 duty to defend?</p> <p>22 A. Yes, I was.</p> <p>23 Q. Okay. Were you the person who</p> <p>24 would sign, actually sign the letter</p> <p>25 undertaking the defense of reserving rights?</p>
<p style="text-align: right;">Page 7</p> <p>1 Chad E. Milton</p> <p>2 the private practice of law.</p> <p>3 My role at Media Professional</p> <p>4 Insurance was what's called a claims</p> <p>5 attorney, which is functioning as a</p> <p>6 representative of the insurance company in</p> <p>7 managing claims. It's not the practice of</p> <p>8 law in the sense that you are thinking of.</p> <p>9 Q. Okay. And how long did you remain</p> <p>10 in active status in Colorado?</p> <p>11 A. I went inactive shortly after I</p> <p>12 left Colorado in 1976. I stayed active for a</p> <p>13 couple of years and then went inactive.</p> <p>14 Q. And then, when did you become a</p> <p>15 member of the Missouri bar?</p> <p>16 A. I became a member of the Missouri</p> <p>17 bar in -- took the bar exam there in February</p> <p>18 of 1978.</p> <p>19 Q. Okay. And how long were you active</p> <p>20 in Missouri?</p> <p>21 A. I was active until about three</p> <p>22 years ago.</p> <p>23 Q. Okay. Now, you mentioned that you</p> <p>24 worked as a claims attorney. As a claims</p> <p>25 attorney -- well, tell me what your job</p>	<p style="text-align: right;">Page 9</p> <p>1 Chad E. Milton</p> <p>2 A. Yes, I was.</p> <p>3 Q. Have you ever, in your work as a</p> <p>4 claims attorney, signed a letter that</p> <p>5 asserted that the insurance company was</p> <p>6 denying coverage because the conduct at issue</p> <p>7 was intentional?</p> <p>8 A. No, I don't believe I did.</p> <p>9 Q. Did you ever sign a letter in which</p> <p>10 an insurance company reserved its rights with</p> <p>11 respect to the issue of whether the conduct</p> <p>12 at issue was intentional?</p> <p>13 A. No, I don't believe I did. That</p> <p>14 notion isn't in the media liability policies</p> <p>15 that I've worked with.</p> <p>16 Q. Did you ever, as a claims attorney,</p> <p>17 work with respect to other types of policies</p> <p>18 held by media companies other than a media</p> <p>19 liability policy?</p> <p>20 A. I'm sorry. I didn't understand the</p> <p>21 question.</p> <p>22 Q. Okay. A media liability policy is</p> <p>23 one type of an insurance policy that</p> <p>24 insurance companies offer; right?</p> <p>25 A. Yes. That's right.</p>

<p style="text-align: right;">Page 10</p> <p>1 Chad E. Milton</p> <p>2 Q. So, for instance, insurance</p> <p>3 companies also offer things such as</p> <p>4 comprehensive general liability policies;</p> <p>5 correct?</p> <p>6 A. Yes, insurance companies do that.</p> <p>7 Q. So, and am I wrong to think that</p> <p>8 not every insurance policy that the media</p> <p>9 company has is a media liability insurance</p> <p>10 policy; right?</p> <p>11 A. No. That would be correct.</p> <p>12 But in my experience, my experience</p> <p>13 was only with the media liability policy.</p> <p>14 Q. That's what I was trying to get to.</p> <p>15 A. Right.</p> <p>16 Q. So, if a media organization that</p> <p>17 was a policyholder of the company you were</p> <p>18 working for made a claim with respect to some</p> <p>19 pending claim, or even a lawsuit that had</p> <p>20 been filed, but the claim was not made under</p> <p>21 the media liability policy, it was made,</p> <p>22 let's say, under their CGL, you wouldn't have</p> <p>23 been involved in it?</p> <p>24 A. I would not have been involved. I</p> <p>25 would not have been involved. And just by</p>	<p style="text-align: right;">Page 12</p> <p>1 Chad E. Milton</p> <p>2 liabilities policies, in your work as a</p> <p>3 claims attorney, did you ever receive a</p> <p>4 demand for coverage from a policyholder with</p> <p>5 respect to an ordinary negligence case?</p> <p>6 MR. HENTOFF: Objection to the form</p> <p>7 of the question.</p> <p>8 A. I think I understand what you're</p> <p>9 asking; but, forgive me, I think you may be</p> <p>10 asking a different question than what I have</p> <p>11 in mind.</p> <p>12 The answer to the question that I</p> <p>13 understand you're asking, an ordinary</p> <p>14 negligence case, such as you might find in a</p> <p>15 general liability policy, the answer to that</p> <p>16 is No, because those kinds of claims aren't</p> <p>17 covered by the media liability policy.</p> <p>18 There is a coverage in media</p> <p>19 liability policies that's called contextual</p> <p>20 negligence, or contextual errors omissions,</p> <p>21 which involves coverage for harm to readers</p> <p>22 of matter, where the reader is harmed by</p> <p>23 relying on erroneous material, such as, the</p> <p>24 most common example is fitness advice.</p> <p>25 Q. So, the idea behind that would be</p>
<p style="text-align: right;">Page 11</p> <p>1 Chad E. Milton</p> <p>2 way of explanation, the organizations that I</p> <p>3 worked with only managed the media liability</p> <p>4 policy, and not any other kind of policy at</p> <p>5 all.</p> <p>6 Q. Okay. So, you, is it fair to say</p> <p>7 you don't have any experience on what</p> <p>8 insurance companies would or would not deny</p> <p>9 coverage on under a CGL policy?</p> <p>10 A. I have no personal knowledge of</p> <p>11 that.</p> <p>12 Q. All right. And, indeed, you do not</p> <p>13 have any personal knowledge of what media --</p> <p>14 excuse me, what insurance companies would or</p> <p>15 would not deny under any sort of policy</p> <p>16 other than the media liability policy?</p> <p>17 A. I have no experience with that.</p> <p>18 Q. Okay. And you would also have no</p> <p>19 experience as to what situations an insurance</p> <p>20 company would reserve its rights under a</p> <p>21 policy that was not a media liability policy;</p> <p>22 correct?</p> <p>23 A. That's correct. That's outside my</p> <p>24 experience.</p> <p>25 Q. Okay. With respect to media</p>	<p style="text-align: right;">Page 13</p> <p>1 Chad E. Milton</p> <p>2 the media publication, let's say, has a</p> <p>3 columnist who writes about health and welfare</p> <p>4 issues, the columnist advises the readers to</p> <p>5 go on a low cholesterol diet.</p> <p>6 A. Right.</p> <p>7 Q. And some reader comes out of the</p> <p>8 woodwork later and says, I followed this</p> <p>9 writer's advice, went on a low cholesterol</p> <p>10 diet, and some terrible health outcome</p> <p>11 resulted; that would be the sort of claim</p> <p>12 that would fall under --</p> <p>13 A. Under the --</p> <p>14 Q. -- under the contextual errors and</p> <p>15 omissions coverage?</p> <p>16 A. That's right. And that's the kind</p> <p>17 of negligence that I do have experience with.</p> <p>18 The kind of negligence, the</p> <p>19 ordinary negligence case I do not.</p> <p>20 Q. Okay. So, if I had a slip and fall</p> <p>21 on the first floor of the New York Times</p> <p>22 building, that would not be covered under a</p> <p>23 typical media liability policy?</p> <p>24 A. It would not be covered under a</p> <p>25 typical media liability policy.</p>

<p style="text-align: right;">Page 14</p> <p>1 Chad E. Milton</p> <p>2 Just to be clear, the media</p> <p>3 liability policy covers perils that arise in</p> <p>4 the gathering, preparation and the utterance</p> <p>5 of content.</p> <p>6 Q. Okay. So, how about if a reporter</p> <p>7 going out to cover a story or meet with a</p> <p>8 source gets into a traffic accident; is that</p> <p>9 covered under a media liability policy?</p> <p>10 A. No, it would not be.</p> <p>11 Q. And what's the reason for that?</p> <p>12 A. The reason is that that -- the</p> <p>13 policies cover, typically cover named perils,</p> <p>14 and except for the contextual errors and</p> <p>15 omissions that I mentioned, negligence is not</p> <p>16 a named peril.</p> <p>17 So, the activities, the perils that</p> <p>18 are covered are things like liable invasion</p> <p>19 of privacy, copyright infringement, and so</p> <p>20 forth; so that the example you gave wouldn't</p> <p>21 give rise to a peril that would be covered by</p> <p>22 the media liability policy.</p> <p>23 Q. Okay. So, to take it one step</p> <p>24 further, let's say a reporter was issued a</p> <p>25 car by the media organization that employed</p>	<p style="text-align: right;">Page 16</p> <p>1 Chad E. Milton</p> <p>2 Q. So, did you ever have a situation</p> <p>3 where an insured interposed a claim that</p> <p>4 involved an employee who you had judged not</p> <p>5 to be acting within the scope of their</p> <p>6 employment?</p> <p>7 A. I don't recall any specific</p> <p>8 instances like that that I can name, but I am</p> <p>9 sure that that has happened.</p> <p>10 Q. And in that situation the typical</p> <p>11 media liability policy only covers acts</p> <p>12 within the scope of employment; correct?</p> <p>13 A. That would be right, only within</p> <p>14 the scope of employment.</p> <p>15 Q. Okay. So, although you don't</p> <p>16 remember specifics, based on your experience</p> <p>17 in the industry, an insurer would typically</p> <p>18 deny coverage if it had determined that, in</p> <p>19 fact, the actions occurred outside the</p> <p>20 employee's scope of employment; correct?</p> <p>21 A. If the act occurred outside the</p> <p>22 scope of employment, then the policy would</p> <p>23 not apply; that would be right.</p> <p>24 Q. During your work as a claims</p> <p>25 attorney, did you ever work with any policy</p>
<p style="text-align: right;">Page 15</p> <p>1 Chad E. Milton</p> <p>2 the reporter.</p> <p>3 And the reporter got into that car</p> <p>4 and drove somewhere on a personal errand --</p> <p>5 say, to meet with a friend, or something like</p> <p>6 that, something that had nothing to do with</p> <p>7 the reporter's job, and the reporter in that</p> <p>8 context ran someone over on the street in</p> <p>9 that trip.</p> <p>10 That would, in your experience, be</p> <p>11 outside the bounds of a media liability</p> <p>12 policy; correct?</p> <p>13 A. Yes, it would be outside the bounds</p> <p>14 of a media liability policy.</p> <p>15 Q. Okay. In your work as a claims</p> <p>16 attorney, did you ever issue any sort of a</p> <p>17 denial letter with respect to a claim that</p> <p>18 your employer felt was outside the scope of</p> <p>19 employment of the person who was the -- well,</p> <p>20 that's a bad way framed question.</p> <p>21 Do you understand the concept, at</p> <p>22 least in a general sense, of scope of</p> <p>23 employment in the law?</p> <p>24 A. Yes, I have a general understanding</p> <p>25 of that.</p>	<p style="text-align: right;">Page 17</p> <p>1 Chad E. Milton</p> <p>2 that was, that contained an exclusion for</p> <p>3 willful misconduct?</p> <p>4 A. I don't recall that. That kind of</p> <p>5 language just isn't typical in media</p> <p>6 liability policies.</p> <p>7 Q. And if I were to ask the same</p> <p>8 question with respect to gross negligence,</p> <p>9 would you give the same answer?</p> <p>10 A. Yes, I would give you the same</p> <p>11 answer.</p> <p>12 Q. Okay. With respect to the</p> <p>13 preparation of this declaration, Exhibit 5,</p> <p>14 did you review any documents in preparing it?</p> <p>15 A. Well, as I state in the</p> <p>16 declaration, I reviewed the section 9.05 of</p> <p>17 the release language, but that's all.</p> <p>18 Q. Okay. So, you didn't go back and</p> <p>19 look at any of your own work papers, for</p> <p>20 instance, in the past?</p> <p>21 A. Well, I did.</p> <p>22 Just to sort of refresh my memory</p> <p>23 about things, I read the, re-read the chapter</p> <p>24 that is cited in the, in my declaration of --</p> <p>25 it's part of Judge Sack's book. I looked at</p>

<p style="text-align: right;">Page 18</p> <p>1 Chad E. Milton</p> <p>2 articles that are posted on my firm's</p> <p>3 Website.</p> <p>4 Q. Okay. So, we have 9.05. We have</p> <p>5 the chapter of Judge Sack's book. And we</p> <p>6 have articles on your Website, your company's</p> <p>7 Website.</p> <p>8 Other than those documents, are</p> <p>9 there any other documents that you reviewed</p> <p>10 in preparing the opinion that you would in</p> <p>11 this declaration?</p> <p>12 A. I did look at specimen policies of</p> <p>13 media liability policies, just to confirm my</p> <p>14 impressions.</p> <p>15 Q. Okay. And just for the record,</p> <p>16 what's a specimen policy?</p> <p>17 A. A specimen is a sample policy.</p> <p>18 Q. And let's just fill this out a bit.</p> <p>19 Am I wrong that a typical insurance policy</p> <p>20 contains a front page, a cover page, a</p> <p>21 declarations page, and then contains a bunch</p> <p>22 of mostly standardized language behind it;</p> <p>23 correct?</p> <p>24 A. Yes, that structure is correct.</p> <p>25 Q. Right. So, a specimen policy</p>	<p style="text-align: right;">Page 20</p> <p>1 Chad E. Milton</p> <p>2 would look at specimen policies; correct?</p> <p>3 A. Yes. That's right.</p> <p>4 Q. And other than the specimen</p> <p>5 policies, articles on your company's Website,</p> <p>6 Judge Sack's book and paragraph 9.05 of the</p> <p>7 plan, is there anything else that you</p> <p>8 reviewed in preparation for your, making your</p> <p>9 declaration in this case?</p> <p>10 A. No. There's nothing else.</p> <p>11 Q. Okay. So, what do you do now? You</p> <p>12 talked about your work as a claims attorney.</p> <p>13 What do you do now?</p> <p>14 A. Now I act as an independent</p> <p>15 consultant on matters relating to media</p> <p>16 liability risk and insurance. Our clients</p> <p>17 are insurance buyers, insurance brokers, and</p> <p>18 insurance companies.</p> <p>19 Q. And as a consultant, do you</p> <p>20 participate only in the purchasing process,</p> <p>21 or do you also participate in the claims</p> <p>22 process?</p> <p>23 A. We participate where the client</p> <p>24 asks us to participate. We've been involved</p> <p>25 in the process of drafting insurance policies</p>
<p style="text-align: right;">Page 19</p> <p>1 Chad E. Milton</p> <p>2 contains language, which is standard, that's</p> <p>3 used by the insurance company repeatedly</p> <p>4 over time in various policies that it issues;</p> <p>5 correct?</p> <p>6 A. Yes. That's what a specimen policy</p> <p>7 is.</p> <p>8 Q. So, a specimen policy would contain</p> <p>9 the language that is typically found in that</p> <p>10 type of insurance policy; correct?</p> <p>11 A. That's -- yes, that's right.</p> <p>12 Q. Okay. But there could be</p> <p>13 situations where a specific insured might</p> <p>14 negotiate a different term, or a change in</p> <p>15 the specimen terms; correct?</p> <p>16 A. Yes, that happens.</p> <p>17 It happens either by way of</p> <p>18 changing the specimen policy, the standard</p> <p>19 policy, by way of endorsement, or by creating</p> <p>20 an entirely new policy, a new contract, which</p> <p>21 is called a bespoke, or a manuscript policy.</p> <p>22 Q. And if I were just researching an</p> <p>23 insurance issue and I wanted to know what do</p> <p>24 insurance companies typically include in</p> <p>25 terms of language on a particular point, I</p>	<p style="text-align: right;">Page 21</p> <p>1 Chad E. Milton</p> <p>2 for insurance companies. We've been involved</p> <p>3 in helping insurance companies manage a</p> <p>4 runoff book of claims. We've been involved</p> <p>5 in helping negotiate coverage disputes.</p> <p>6 And we've also been involved with</p> <p>7 helping insurance buyers place insurance. We</p> <p>8 are not insurance brokers.</p> <p>9 So that we, we don't act as actual</p> <p>10 in the placement of the policy, but we advise</p> <p>11 on it.</p> <p>12 Q. Okay. Has any of your clients ever</p> <p>13 asked you to include an exclusion in a policy</p> <p>14 for willful misconduct?</p> <p>15 A. No.</p> <p>16 Q. Has any of your clients ever asked</p> <p>17 you to include an exclusion for gross</p> <p>18 negligence?</p> <p>19 A. No.</p> <p>20 Q. In your current employment as an</p> <p>21 independent consultant, have you ever come</p> <p>22 across a policy that contained an exclusion</p> <p>23 for willful misconduct?</p> <p>24 A. No.</p> <p>25 Q. Have you ever come across a policy</p>

<p style="text-align: right;">Page 22</p> <p>1 Chad E. Milton</p> <p>2 that included an exclusion for gross</p> <p>3 negligence?</p> <p>4 A. No.</p> <p>5 Q. Has any one, any of your clients at</p> <p>6 your current, during your current employment</p> <p>7 as an independent consultant, ever asked you</p> <p>8 to interpret a policy that contained a</p> <p>9 willful misconduct exclusion?</p> <p>10 A. No.</p> <p>11 Q. And would your answer be the same</p> <p>12 as to gross negligence?</p> <p>13 A. Yes, it would.</p> <p>14 Q. Okay. And now, going back in your</p> <p>15 prior employment, in your various positions</p> <p>16 relating to the insurance industry, going all</p> <p>17 the way back over four decades, has anyone</p> <p>18 ever asked you to interpret language in a</p> <p>19 policy excluding willful misconduct?</p> <p>20 A. No. I don't think so. That's just</p> <p>21 not a concept that is in media liability</p> <p>22 policies.</p> <p>23 Q. Okay. And would your answer be the</p> <p>24 same as to gross negligence?</p> <p>25 A. Yes, it would be.</p>	<p style="text-align: right;">Page 24</p> <p>1 Chad E. Milton</p> <p>2 you would go back to the insurance company</p> <p>3 and ask them to take it out; wouldn't you?</p> <p>4 A. Yes, I would ask them to take it</p> <p>5 out.</p> <p>6 Q. And why?</p> <p>7 A. Because exclusionary language like</p> <p>8 that undercuts the entire purpose of a media</p> <p>9 liability policy. Because the media</p> <p>10 liability policies cover perils, and</p> <p>11 implicitly or explicitly cover the elements</p> <p>12 that give rise to the perils.</p> <p>13 And sometimes, in certain cases,</p> <p>14 the evidence that supports the perils might</p> <p>15 be called gross negligence or willful</p> <p>16 misconduct.</p> <p>17 And in those cases where I'm</p> <p>18 representing the potential insured, I don't</p> <p>19 want to run the risk of losing the benefit of</p> <p>20 the insurance policy, because you run the</p> <p>21 risk of losing, because you've lost the</p> <p>22 claim.</p> <p>23 I want coverage for the claims that</p> <p>24 we lose, as well as for coverage for claims</p> <p>25 that we win.</p>
<p style="text-align: right;">Page 23</p> <p>1 Chad E. Milton</p> <p>2 MR. ESPER: Okay. Let's take a</p> <p>3 short break.</p> <p>4 Off the record.</p> <p>5 (Whereupon, an off-the-record</p> <p>6 discussion was held.)</p> <p>7 MR. ESPER: On the record.</p> <p>8 Q. Now, you indicated in your current</p> <p>9 work you sometimes work for insurance</p> <p>10 companies and sometimes for policyholders;</p> <p>11 right?</p> <p>12 A. Yes. That's right. We work for</p> <p>13 both.</p> <p>14 Q. Okay. So, I want, for the next</p> <p>15 question I'm going to ask you a hypothetical</p> <p>16 and I want you to put yourself in a position</p> <p>17 where you're working for a policyholder</p> <p>18 rather than an insurance company, or a</p> <p>19 potential policyholder that are seeking</p> <p>20 insurance.</p> <p>21 A. Um-hum.</p> <p>22 Q. So, if your client seeking media</p> <p>23 liability insurance is sent a draft policy by</p> <p>24 an insurance company that contained a gross</p> <p>25 negligence and willful misconduct exclusion,</p>	<p style="text-align: right;">Page 25</p> <p>1 Chad E. Milton</p> <p>2 Q. And to concretize this a bit, one</p> <p>3 of the situations where you would be</p> <p>4 concerned about the language of the exclusion</p> <p>5 undercutting the purpose of the policy would</p> <p>6 be where there was a defamation claim;</p> <p>7 correct?</p> <p>8 A. Yes. That is correct. It's most</p> <p>9 important in a defamation claim.</p> <p>10 Q. Your concern would be that a</p> <p>11 defamation claim might end up falling within</p> <p>12 the exclusion for gross negligence and</p> <p>13 willful misconduct; correct?</p> <p>14 A. Yes, I would be concerned about</p> <p>15 that.</p> <p>16 Q. Okay. Now, even media liability</p> <p>17 policies do contain some exclusions; correct?</p> <p>18 A. Yes, they do contain exclusions.</p> <p>19 Q. So, is it correct that a typical</p> <p>20 exclusion would cover criminal acts by the</p> <p>21 reporter?</p> <p>22 A. That is a typical exclusion.</p> <p>23 Q. Okay.</p> <p>24 A. Although in many policies that</p> <p>25 exclusion has a carve-back for the coverage</p>



<p style="text-align: right;">Page 26</p> <p>1 Chad E. Milton</p> <p>2 can be extended to criminal acts under</p> <p>3 certain circumstances.</p> <p>4 Q. Okay. And what would be a typical</p> <p>5 version of the carve-back that you just --</p> <p>6 A. The typical carve-back is that the</p> <p>7 exclusion would not apply in circumstances</p> <p>8 where the conduct was approved by the</p> <p>9 insured's counsel, for reasons that it was</p> <p>10 protected by the First Amendment.</p> <p>11 Q. Okay. So, for instance, that might</p> <p>12 cover a situation where a reporter was held</p> <p>13 in contempt for refusing to reveal a source?</p> <p>14 A. Well, that's treated differently in</p> <p>15 insurance, in a different place in insurance</p> <p>16 policies.</p> <p>17 Q. Okay. So, what would be an example</p> <p>18 of something that an insurance company</p> <p>19 counsel, in your experience, might approve in</p> <p>20 terms of a criminal act?</p> <p>21 A. Counsel might approve an illegal</p> <p>22 wiretap as a way of gathering, protecting</p> <p>23 newsworthy information.</p> <p>24 Q. I understand. Okay.</p> <p>25 So, let's take a situation where</p>	<p style="text-align: right;">Page 28</p> <p>1 Chad E. Milton</p> <p>2 the illegal intrusion, that claim would be</p> <p>3 defended under a reservation of rights, but</p> <p>4 would not be paid if there were a finding</p> <p>5 that were, that there was a criminal conduct.</p> <p>6 Q. Okay. I understand. And I think I</p> <p>7 understand where you're, what you're</p> <p>8 testifying to; but I'm actually, I think,</p> <p>9 asking a slightly different question, which</p> <p>10 is part of your opinion that you've given in</p> <p>11 this case. It's not simply an opinion about</p> <p>12 the content of the insurance policies, but</p> <p>13 also an opinion about the content of media</p> <p>14 company indemnification agreements; correct?</p> <p>15 A. No. My opinion --</p> <p>16 MR. HENTOFF: Objection. I'm</p> <p>17 sorry. Go ahead.</p> <p>18 A. No. My opinion is only about</p> <p>19 indemnification under insurance when</p> <p>20 insurance is involved.</p> <p>21 Q. Okay. Turn the page to paragraph</p> <p>22 22 of your declaration. I'll read it into</p> <p>23 the record because it's short.</p> <p>24 "Based on my experience, because</p> <p>25 insurance coverage would be available, as a</p>
<p style="text-align: right;">Page 27</p> <p>1 Chad E. Milton</p> <p>2 the exclusion does apply; so, it's not</p> <p>3 conduct that's been approved by the insurance</p> <p>4 counsel, it's just an illegal act by a</p> <p>5 reporter that was never run by the insurance</p> <p>6 counsel, and it's going to fall within the</p> <p>7 exclusion.</p> <p>8 Now, in your experience, do media</p> <p>9 companies typically indemnify for that type</p> <p>10 of conduct in their indemnification</p> <p>11 agreements?</p> <p>12 MR. HENTOFF: Objection to the form</p> <p>13 of the question.</p> <p>14 A. Yes, they would indemnify for that</p> <p>15 kind of conduct; they would defend and</p> <p>16 indemnify.</p> <p>17 It would depend on what the</p> <p>18 allegations of the complaint were. If they</p> <p>19 were a defamation claim, the defamation claim</p> <p>20 would be -- if that defamation claim arose</p> <p>21 from the conduct, or was, the publication had</p> <p>22 information that was gathered during that</p> <p>23 illegal wiretap, let's say, the defamation</p> <p>24 claim would be covered.</p> <p>25 If there were a separate claim for</p>	<p style="text-align: right;">Page 29</p> <p>1 Chad E. Milton</p> <p>2 matter of course a media company would</p> <p>3 indemnify and defend its employees and</p> <p>4 free-lancers for defamation claims alleging</p> <p>5 willful misconduct or gross negligence."</p> <p>6 That's an opinion about what media companies</p> <p>7 would do, and not simply about what insurance</p> <p>8 companies would do; right?</p> <p>9 A. No. It's my understanding of the</p> <p>10 paragraph, that has to do with indemnities in</p> <p>11 the context of insurance coverage.</p> <p>12 Q. Okay. But what did you mean by "a</p> <p>13 media company would indemnify and defend"?</p> <p>14 A. What I mean is that a media company</p> <p>15 would extend insurance coverage to its</p> <p>16 employees and its independent contractors.</p> <p>17 Q. Okay. So, you have no opinion as</p> <p>18 to what might be contained in contracts</p> <p>19 between a media company and their reporters?</p> <p>20 A. No. I have no opinion about that.</p> <p>21 Q. And you have no idea of what</p> <p>22 obligations a media company might believe it</p> <p>23 has with respect to actually paying claims</p> <p>24 made against their employees?</p> <p>25 MR. HENTOFF: Objection to the form</p>

<p style="text-align: right;">Page 30</p> <p>1 Chad E. Milton</p> <p>2 of the question.</p> <p>3 A. I have experience with media</p> <p>4 companies that have asked to extend coverage</p> <p>5 to employees in ways contrary to indemnity</p> <p>6 agreements and contractual agreements. And I</p> <p>7 understand those situations.</p> <p>8 In general, I don't have an opinion</p> <p>9 about those contracts.</p> <p>10 Q. Okay. And you do not in your work</p> <p>11 routinely deal with the content of media</p> <p>12 company indemnification agreements with their</p> <p>13 employees; correct?</p> <p>14 A. That is correct. I don't routinely</p> <p>15 deal with that, with those contracts between</p> <p>16 the publishers and their content providers.</p> <p>17 Q. Okay. And if I were to, let's</p> <p>18 say -- I'll ask you a question, and then I'll</p> <p>19 ask if you have knowledge about that area.</p> <p>20 But the question would be: Outside</p> <p>21 of what the insurance policy may contain and</p> <p>22 what the insurance company may do, do media</p> <p>23 companies typically undertake a legal</p> <p>24 obligation to indemnify their reporters for</p> <p>25 willful misconduct? You would not have the</p>	<p style="text-align: right;">Page 32</p> <p>1 Chad E. Milton</p> <p>2 Q. And would your answer be the same</p> <p>3 with respect to media companies undertaking</p> <p>4 to indemnify their employees and their</p> <p>5 contracts for acts of gross negligence?</p> <p>6 A. My answer would be the same.</p> <p>7 Is that that's outside the scope of</p> <p>8 my knowledge.</p> <p>9 I do know that it's typical for</p> <p>10 media companies to ask their insurer to cover</p> <p>11 independent contractors.</p> <p>12 MR. HENTOFF: Off the record.</p> <p>13 (Whereupon, an off-the-record</p> <p>14 discussion was held.)</p> <p>15 Q. And I take it you also are</p> <p>16 expressing no opinion about whether any</p> <p>17 particular indemnification agreement made by</p> <p>18 a media company would actually be enforced in</p> <p>19 court, if somebody decided to test it?</p> <p>20 A. No. I have no opinion about</p> <p>21 enforceability of those contracts.</p> <p>22 Q. Okay. So, you're not expressing</p> <p>23 any opinion about whether an indemnification</p> <p>24 agreement that indemnifies willful misconduct</p> <p>25 would be considered a contract in violation</p>
<p style="text-align: right;">Page 31</p> <p>1 Chad E. Milton</p> <p>2 expertise to answer that question?</p> <p>3 A. I do not have the expertise to</p> <p>4 answer that question.</p> <p>5 I do know that media companies have</p> <p>6 the power under most, the media liability</p> <p>7 policies to extend coverage to independent</p> <p>8 contractors, and have often been asked by</p> <p>9 media companies to do that.</p> <p>10 Q. But that's an issue of what the</p> <p>11 insurance company is going to end up</p> <p>12 covering; correct?</p> <p>13 A. That is correct. And that's the</p> <p>14 only issue that I deal with.</p> <p>15 Q. And whatever may or may not be in</p> <p>16 the contract between the media company and</p> <p>17 the independent contractor, you would not</p> <p>18 know that?</p> <p>19 A. Sometimes I see those contracts,</p> <p>20 but that's not my issue and it's not</p> <p>21 something that I'm asked to advise about.</p> <p>22 Q. And it's not something that you</p> <p>23 have any particular expertise on?</p> <p>24 A. That's correct. I don't have any</p> <p>25 particular expertise.</p>	<p style="text-align: right;">Page 33</p> <p>1 Chad E. Milton</p> <p>2 of public policy?</p> <p>3 A. No. As between a publisher and its</p> <p>4 free-lance writers, I have no opinion about</p> <p>5 that.</p> <p>6 Q. Or as between a publisher and its</p> <p>7 employed writers; right?</p> <p>8 A. Likewise, I have no opinion about</p> <p>9 that.</p> <p>10 Q. And that your answer would be the</p> <p>11 same as to contracts that indemnify, purport</p> <p>12 to indemnify gross negligence; right?</p> <p>13 A. Well, with respect to all those</p> <p>14 contracts between the publisher and other</p> <p>15 persons, I have no opinion.</p> <p>16 Q. Now, let's go on to paragraphs 20</p> <p>17 and 21 on page 6 of your declaration, Exhibit</p> <p>18 5. You can read them to yourself, so that</p> <p>19 you know what we're going to talk about.</p> <p>20 A. Okay.</p> <p>21 (Pause)</p> <p>22 Q. And I believe you've testified</p> <p>23 earlier that in preparation for this</p> <p>24 declaration, you read sections 9.05 of the</p> <p>25 plan; correct?</p>

<p style="text-align: right;">Page 34</p> <p>1 Chad E. Milton</p> <p>2 A. That's right.</p> <p>3 Q. Yeah. So, did you read any of the</p> <p>4 correspondence negotiating section 9.05 of</p> <p>5 the plan?</p> <p>6 A. No, I didn't read any of that</p> <p>7 correspondence.</p> <p>8 Q. Did you have any conversations with</p> <p>9 any of the people who negotiated section 9.05</p> <p>10 of the plan concerning what they talked about</p> <p>11 with each other?</p> <p>12 A. No. I had no conversations with</p> <p>13 anyone about that.</p> <p>14 Q. Okay. You have no opinion as to</p> <p>15 what the drafters may have actually intended</p> <p>16 when they included the language about gross</p> <p>17 negligence and willful misconduct in section</p> <p>18 9.05; correct?</p> <p>19 A. I have no knowledge and no opinion</p> <p>20 about the intent behind this language.</p> <p>21 Q. Okay. Have you ever advised anyone</p> <p>22 who was drafting a plan of liquidation in a</p> <p>23 bankruptcy court?</p> <p>24 A. No. I've never been involved with</p> <p>25 a bankruptcy.</p>	<p style="text-align: right;">Page 36</p> <p>1 Chad E. Milton</p> <p>2 the drafters of this bankruptcy plan back at</p> <p>3 the time it was being drafted, you would have</p> <p>4 told them not to include an exclusion for</p> <p>5 gross negligence and willful misconduct;</p> <p>6 correct?</p> <p>7 MR. HENTOFF: Objection to the form</p> <p>8 of the question.</p> <p>9 A. Well, I don't think I can speculate</p> <p>10 about what I would have said and what I would</p> <p>11 have been consulted about.</p> <p>12 If I were being asked to</p> <p>13 participate about how there might be</p> <p>14 insurance coverage involved, then I could</p> <p>15 have advised about that.</p> <p>16 But in the absence of the presence</p> <p>17 of insurance, I would have no opinion.</p> <p>18 Q. Okay. Let's add facts to the</p> <p>19 hypothetical.</p> <p>20 Let's suppose that the person who</p> <p>21 asked you for advice told you that the</p> <p>22 purpose of the releases would be to track the</p> <p>23 insurance coverage that is available for</p> <p>24 writers. In that situation, would you then</p> <p>25 advise the client that language regarding</p>
<p style="text-align: right;">Page 35</p> <p>1 Chad E. Milton</p> <p>2 Q. And fair to stay that before this</p> <p>3 case you've never been asked by anyone in any</p> <p>4 capacity to interpret language contained in a</p> <p>5 release in a bankruptcy plan?</p> <p>6 MR. HENTOFF: Objection to the form</p> <p>7 of the question.</p> <p>8 A. No. That's correct. I've never</p> <p>9 been asked to participate or advise in any</p> <p>10 way in a bankruptcy claim.</p> <p>11 Q. So, you have no experience as to</p> <p>12 how legal terminology is used in a bankruptcy</p> <p>13 plan; correct?</p> <p>14 A. That's correct; I have no knowledge</p> <p>15 about that.</p> <p>16 Q. So, for instance, if hypothetically</p> <p>17 and I want to make clear, I'm assuming a fact</p> <p>18 that may not actually be in evidence, but if,</p> <p>19 hypothetically, gross negligence and willful</p> <p>20 misconduct were terms of art in the</p> <p>21 bankruptcy context, that's not something you</p> <p>22 would know about; correct?</p> <p>23 A. That's correct; I would not know</p> <p>24 about those terms of art.</p> <p>25 Q. Okay. If you had been consulted by</p>	<p style="text-align: right;">Page 37</p> <p>1 Chad E. Milton</p> <p>2 gross negligence and willful misconduct not</p> <p>3 be included in section 9.05?</p> <p>4 MR. HENTOFF: Objection to the form</p> <p>5 of the question.</p> <p>6 A. I don't think I can say that I</p> <p>7 would have an opinion about what I would</p> <p>8 advise.</p> <p>9 I would advise that irrespective of</p> <p>10 the language in the contract, that there be a</p> <p>11 mechanism to extend insurance coverage to</p> <p>12 these persons. And I would advise that the</p> <p>13 insurance policy not have that sort of</p> <p>14 exclusionary language.</p> <p>15 Q. And the reason you would advise</p> <p>16 that is because, as you testified earlier, if</p> <p>17 that language were included in the insurance</p> <p>18 policy, it could have the effect of defeating</p> <p>19 the purpose of the policy; correct?</p> <p>20 A. That's right. And that's actually</p> <p>21 the point of paragraph 21 of my statement.</p> <p>22 Q. Now, in paragraph 21 -- let's read</p> <p>23 it for the record; that will make it easier.</p> <p>24 "If section 9.05 of the plan were</p> <p>25 read to exclude a defamation plaintiff's</p>

<p style="text-align: right;">Page 38</p> <p>1 Chad E. Milton</p> <p>2 claims of gross negligence or willful</p> <p>3 misconduct, it would conceivably exclude any</p> <p>4 and all defamation claims. In my experience</p> <p>5 the indemnification obligations of a media</p> <p>6 company to its employees and free-lancers do</p> <p>7 not contain any such exception, as it would</p> <p>8 render the indemnification obligation almost</p> <p>9 meaningless.</p> <p>10 "This is because many, if not most</p> <p>11 defamation lawsuits seek to prove that a</p> <p>12 defendant's conduct was intentional and</p> <p>13 wrongful and the purpose of the</p> <p>14 indemnification obligations is to protect</p> <p>15 employees and free-lancers not only when they</p> <p>16 win a defamation case, but also when they</p> <p>17 lose one."</p> <p>18 So, first of all, you say, "many,</p> <p>19 if not most defamation lawsuits seek to prove</p> <p>20 that a defendant's conduct was intentional</p> <p>21 and wrongful."</p> <p>22 There are defamation cases that are</p> <p>23 brought based on theories of ordinary</p> <p>24 negligence; correct?</p> <p>25 A. Yes. A lawsuit brought by a</p>	<p style="text-align: right;">Page 40</p> <p>1 Chad E. Milton</p> <p>2 illusory." I assume you think it would be</p> <p>3 unfair because the fact is that people in the</p> <p>4 journalism business often write about public</p> <p>5 figures and, therefore, many defamation</p> <p>6 claims would allege actual malice and</p> <p>7 potentially be excluded; is that a fair</p> <p>8 statement?</p> <p>9 A. I think that's a fair statement.</p> <p>10 My point is that media companies</p> <p>11 and their writers, when they have insurance</p> <p>12 coverage, expect that there will be coverage</p> <p>13 for the perils that arise from the insured</p> <p>14 activity. And to the extent that writers and</p> <p>15 publishers do stories about public persons,</p> <p>16 that conduct would rise to the level of</p> <p>17 actual malice; and to then say that that kind</p> <p>18 of conduct triggers an exclusionary policy</p> <p>19 and denies coverage would be -- exclusionary</p> <p>20 language would cause a claim to be denied</p> <p>21 would be contrary to the expectations of the</p> <p>22 insured, and thus illusory and unfair.</p> <p>23 Q. Okay. Now, "illusory" is different</p> <p>24 than "unfair"; isn't it?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 39</p> <p>1 Chad E. Milton</p> <p>2 private person in most states would allege</p> <p>3 that the reporter's or writer's state of mind</p> <p>4 was one of negligence.</p> <p>5 They would still allege that the</p> <p>6 statement was made intentionally.</p> <p>7 Q. However, am I not right to infer</p> <p>8 that you are leaving open in this paragraph</p> <p>9 the possibility that a defamation claim based</p> <p>10 on ordinary negligence might not trigger the</p> <p>11 gross negligence willful misconduct</p> <p>12 exclusion; correct?</p> <p>13 MR. HENTOFF: Objection to the form</p> <p>14 of the question.</p> <p>15 A. Yes. It's my view that</p> <p>16 exclusionary language doesn't exclude all</p> <p>17 claims, but only certain claims.</p> <p>18 And from an insurer's point of</p> <p>19 view, and an insurance buyer's point of view,</p> <p>20 if it excludes some claims, that makes the</p> <p>21 policy unfair and illusory.</p> <p>22 So, the short answer to your</p> <p>23 question is Yes, but there's a longer answer,</p> <p>24 too.</p> <p>25 Q. Okay. And you said "unfair and</p>	<p style="text-align: right;">Page 41</p> <p>1 Chad E. Milton</p> <p>2 Q. If an insurance policy covers some</p> <p>3 perils, but not every potential peril, that's</p> <p>4 not considered in your experience an illusory</p> <p>5 contract; is it?</p> <p>6 A. No, it's not. In my experience an</p> <p>7 illusory contract is one that offers coverage</p> <p>8 for a peril and then takes it away.</p> <p>9 Q. But if a contract that -- an</p> <p>10 insurance contract that offers coverage for</p> <p>11 some perils, but not for other perils, might</p> <p>12 be unfair, but would it be illusory; right?</p> <p>13 MR. HENTOFF: Objection to the form</p> <p>14 of the question.</p> <p>15 A. It could be considered unfair.</p> <p>16 I don't know that it's unfair to</p> <p>17 say to an insured that these kinds of perils</p> <p>18 aren't covered.</p> <p>19 But that's not, that's not</p> <p>20 illusory; that's just what the coverage of</p> <p>21 the policy is.</p> <p>22 Q. If a hypothetical insurance policy</p> <p>23 offered coverage with respect to defamation</p> <p>24 of private figures, but not defamation of</p> <p>25 public figures, would you consider such a</p>

<p style="text-align: right;">Page 42</p> <p>1 Chad E. Milton</p> <p>2 policy illusory?</p> <p>3 MR. HENTOFF: Objection to the form</p> <p>4 of the question.</p> <p>5 Incomplete hypothetical.</p> <p>6 A. I would not consider that to be</p> <p>7 illusory, because the expectation is made</p> <p>8 clear. But it's not something that anybody</p> <p>9 would buy.</p> <p>10 Q. Let's go on with this.</p> <p>11 Your first sentence in paragraph 21</p> <p>12 says, "If section 9.05 of the plan were read</p> <p>13 to exclude a defamation plaintiff's claims of</p> <p>14 gross negligence or willful misconduct." You</p> <p>15 testified you read section 9.05.</p> <p>16 Do you believe there is any other</p> <p>17 reasonable reading of it, other than it would</p> <p>18 exclude a defamation plaintiff's claims of</p> <p>19 gross negligence and willful misconduct?</p> <p>20 MR. HENTOFF: Objection to the form</p> <p>21 the question.</p> <p>22 And if you're going to ask the</p> <p>23 witness about section 9.05, would you</p> <p>24 please show it to him so he can review</p> <p>25 it before answering your question about</p>	<p style="text-align: right;">Page 44</p> <p>1 Chad E. Milton</p> <p>2 A. I agree that those words are in the</p> <p>3 release.</p> <p>4 I also know from my experience that</p> <p>5 the words, exclusionary words in contracts</p> <p>6 and insurance policies and agreements are</p> <p>7 often interpreted at the moment that they</p> <p>8 become at issue.</p> <p>9 And from an insurer's point of</p> <p>10 view -- which again, is all that I can speak</p> <p>11 about -- from an insurer's point of view, I</p> <p>12 could -- if such language like this were in</p> <p>13 an insurance policy that was expected to</p> <p>14 cover defamation claims, I would expect the</p> <p>15 insurer to say that these words "gross</p> <p>16 negligence willful misconduct" may apply to</p> <p>17 some kinds, to some perils, but they do not</p> <p>18 apply to defamation.</p> <p>19 Q. Did you engage in any research or</p> <p>20 any gathering of facts to determine whether</p> <p>21 the authors of 9.05 intended the release to</p> <p>22 cover defamation claims?</p> <p>23 A. No. I did no such research.</p> <p>24 Q. Is it fair to say that you simply</p> <p>25 assumed that was the case?</p>
<p style="text-align: right;">Page 43</p> <p>1 Chad E. Milton</p> <p>2 it?</p> <p>3 MR. ESPER: I think I can ask the</p> <p>4 witness the question, and if the witness</p> <p>5 responds in a certain way, he responds</p> <p>6 in a certain way. If he responds in</p> <p>7 another way, I can ask another question,</p> <p>8 or I can show him what I want to show</p> <p>9 him.</p> <p>10 MR. HENTOFF: You're permitted to</p> <p>11 do whatever you want to do.</p> <p>12 That's my objection.</p> <p>13 MR. ESPER: Yes. Okay.</p> <p>14 Q. So, you reviewed section 9.05 in</p> <p>15 preparing this declaration; correct?</p> <p>16 A. I did.</p> <p>17 Q. Okay. So, your first sentence of</p> <p>18 paragraph 21 states a hypothetical: "If</p> <p>19 section 9.05 were read to exclude a</p> <p>20 defamation plaintiff's claim of gross</p> <p>21 negligence or willful misconduct," and my</p> <p>22 question is: Did you conclude there was any</p> <p>23 other possible reading of section 9.05?</p> <p>24 MR. HENTOFF: Objection to the form</p> <p>25 of the question. Same objection.</p>	<p style="text-align: right;">Page 45</p> <p>1 Chad E. Milton</p> <p>2 MR. HENTOFF: Objection to the form</p> <p>3 of the question.</p> <p>4 A. No. I made no assumption at all</p> <p>5 about what the drafters of section 9.05</p> <p>6 intended.</p> <p>7 I only meant to say that if this</p> <p>8 sort of language were to appear in an</p> <p>9 insurance contract, that the insurer would</p> <p>10 likely say that this language is inoperative</p> <p>11 as respects defamation claims for the reasons</p> <p>12 that I've testified earlier.</p> <p>13 Q. But you don't know that for sure,</p> <p>14 because you've never seen this language in a</p> <p>15 media insurance policy; correct?</p> <p>16 MR. HENTOFF: Objection to the form</p> <p>17 of the question.</p> <p>18 A. No. That's correct.</p> <p>19 MR. HENTOFF: I'm sorry. Could you</p> <p>20 read back the question and the answer.</p> <p>21 (Whereupon, the referred to</p> <p>22 questions and answers were read back by</p> <p>23 the Reporter.)</p> <p>24 Q. Did you engage in any analysis as</p> <p>25 to whether a bankruptcy plan that did not</p>

<p style="text-align: right;">Page 46</p> <p>1 Chad E. Milton</p> <p>2 contain an exclusion for gross negligence or</p> <p>3 willful misconduct would be approved by a</p> <p>4 bankruptcy court?</p> <p>5 MR. HENTOFF: Objection to the form</p> <p>6 of the question.</p> <p>7 A. No. As I testified earlier, I've</p> <p>8 had no experience with bankruptcy and did no</p> <p>9 research into bankruptcy proceedings in</p> <p>10 connection with this.</p> <p>11 Q. And did you do any analysis as to</p> <p>12 whether or not New York law would permit such</p> <p>13 a release without the gross negligence or</p> <p>14 willful misconduct language?</p> <p>15 A. No. I did no such research.</p> <p>16 Q. Other than the opinions that you</p> <p>17 included in this declaration, did you form</p> <p>18 any other opinions relating to the issues in</p> <p>19 this case?</p> <p>20 A. No. My only opinions are set out</p> <p>21 in the declaration.</p> <p>22 Q. Okay.</p> <p>23 MR. ESPER: Let's take a very short</p> <p>24 break.</p> <p>25 Off the record.</p>	<p style="text-align: right;">Page 48</p> <p>1 Chad E. Milton</p> <p>2 State of New York -- what is the standard of</p> <p>3 fault when a libel case is brought by a</p> <p>4 non-public figure, versus when a libel case</p> <p>5 is brought by a public figure?</p> <p>6 MR. ESPER: Object as to form.</p> <p>7 A. Well, of course you don't know</p> <p>8 until the end of the litigation whether the</p> <p>9 plaintiff is a private person or a public</p> <p>10 person.</p> <p>11 But the law in most states is that</p> <p>12 when the plaintiff is a private person, the</p> <p>13 standard of conduct is negligence.</p> <p>14 Q. And what about if the plaintiff is</p> <p>15 a public figure?</p> <p>16 MR. ESPER: Same objection.</p> <p>17 A. Then the standard of conduct is</p> <p>18 actual malice -- that term of art, as knowing</p> <p>19 a reckless disregard for the truth.</p> <p>20 Q. And is it ever disputed in a case</p> <p>21 between the parties whether or not the</p> <p>22 plaintiff qualifies as a public figure or a</p> <p>23 non-public figure?</p> <p>24 MR. ESPER: Same objection.</p> <p>25 A. Yes, it's -- that's often disputed.</p>
<p style="text-align: right;">Page 47</p> <p>1 Chad E. Milton</p> <p>2 (Whereupon, a short recess was</p> <p>3 taken.)</p> <p>4 MR. ESPER: Back on the record.</p> <p>5 I have no further questions.</p> <p>6 MR. HENTOFF: So, I just have a</p> <p>7 couple of questions.</p> <p>8 MR. ESPER: Go ahead.</p> <p>9 MR. HENTOFF: Okay.</p> <p>10 EXAMINATION BY</p> <p>11 MR. HENTOFF:</p> <p>12 Q. Mr. Milton, you recall that you</p> <p>13 were asked some questions about circumstances</p> <p>14 in which a libel case could be brought, but</p> <p>15 the plaintiff would only be claiming</p> <p>16 negligence as a standard of fault; do you</p> <p>17 remember that?</p> <p>18 A. Yes, I do remember that.</p> <p>19 Q. And do you recall being asked</p> <p>20 about --</p> <p>21 Well, strike that question.</p> <p>22 And in some cases can you tell us</p> <p>23 about, very generally, about your</p> <p>24 understanding of what the standard of fault</p> <p>25 is -- let's say for right now, outside the</p>	<p style="text-align: right;">Page 49</p> <p>1 Chad E. Milton</p> <p>2 Q. Let's imagine a situation in which</p> <p>3 a plaintiff has filed a defamation lawsuit,</p> <p>4 and a court determines that the plaintiff is</p> <p>5 a non-public figure. Do you understand that?</p> <p>6 A. Yes.</p> <p>7 Q. Are there circumstances in that</p> <p>8 case in which the issue of whether the</p> <p>9 defendant acted with actual malice might</p> <p>10 nevertheless be litigated in that case?</p> <p>11 MR. ESPER: Same objection.</p> <p>12 A. Yes, actual malice would be</p> <p>13 relevant, for instance, if, in fact, punitive</p> <p>14 damages were sought.</p> <p>15 Q. Are you familiar with the concept</p> <p>16 of the defense of privilege in a defamation</p> <p>17 case?</p> <p>18 MR. ESPER: Same objection.</p> <p>19 A. Yes, I am.</p> <p>20 Q. Can you just give an example of a</p> <p>21 kind of defamation privilege that might be</p> <p>22 asserted by a defendant in a defamation case?</p> <p>23 MR. ESPER: Same objection.</p> <p>24 A. A defendant might assert that the</p> <p>25 story was a fair and accurate report of a</p>

<p style="text-align: right;">Page 50</p> <p>1 Chad E. Milton</p> <p>2 public proceeding.</p> <p>3 Q. So, with regard to defamation cases</p> <p>4 in which a privilege is asserted, let's</p> <p>5 imagine still that the plaintiff is a</p> <p>6 non-public figure. Are there ever situations</p> <p>7 in which either malice or actual malice is</p> <p>8 litigated in the context of whether a</p> <p>9 defamation privilege applies in the case?</p> <p>10 MR. ESPER: Same objection.</p> <p>11 A. Yes.</p> <p>12 MR. HENTOFF: I have no further</p> <p>13 questions.</p> <p>14 EXAMINATION (cont'd)</p> <p>15 BY MR. ESPER:</p> <p>16 Q. Mr. Milton, in a situation where a</p> <p>17 claim is made that could result in coverage,</p> <p>18 but also could result in coverage ultimately</p> <p>19 being denied, the insurance company has the</p> <p>20 option of defending with a reservation of</p> <p>21 rights; correct?</p> <p>22 A. Yes. That's correct.</p> <p>23 A claim that's potentially not</p> <p>24 covered will be defended under reservation of</p> <p>25 rights.</p>	<p style="text-align: right;">Page 52</p> <p>1</p> <p>2 E X H I B I T S</p> <p>3 Milton Exhibit 5, expert 6</p> <p>4 declaration of Chad E. Milton</p> <p>5</p> <p>6 (Exhibit Maintained By Reporter)</p> <p>7 I N D E X</p> <p>8 EXAMINATION BY PAGE</p> <p>9 MR. ESPER 3, 50</p> <p>10 MR. HENTOFF 47</p> <p>11 INFORMATION AND/OR DOCUMENTS REQUESTED</p> <p>12 (None)</p> <p>13 QUESTIONS MARKED FOR RULINGS</p> <p>14 (None)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 51</p> <p>1 Chad E. Milton</p> <p>2 MR. ESPER: No further questions.</p> <p>3 MR. HENTOFF: And we have no</p> <p>4 further questions either.</p> <p>5 THE WITNESS: Thank you.</p> <p>6 (Whereupon, at 11:19 a.m., the</p> <p>7 Examination of this witness was</p> <p>8 concluded.)</p> <p>9</p> <p>10</p> <p>11 _____</p> <p>12 CHAD E. MILTON</p> <p>13</p> <p>14 Subscribed and sworn to before me</p> <p>15 this ____ day of _____, 20__.</p> <p>16</p> <p>17 _____</p> <p>18 NOTARY PUBLIC</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 53</p> <p>1</p> <p>2 C E R T I F I C A T E</p> <p>3</p> <p>4 STATE OF NEW YORK )</p> <p>5 : SS.:</p> <p>6 COUNTY OF NEW YORK )</p> <p>7</p> <p>8 I, ROBERT X. SHAW, CSR, a Notary</p> <p>9 Public for and within the State of New York,</p> <p>10 do hereby certify:</p> <p>11 That the witness whose examination</p> <p>12 is hereinbefore set forth was duly sworn and</p> <p>13 that such examination is a true record of the</p> <p>14 testimony given by that witness.</p> <p>15 I further certify that I am not</p> <p>16 related to any of the parties to this action</p> <p>17 by blood or by marriage and that I am in no</p> <p>18 way interested in the outcome of this matter.</p> <p>19 IN WITNESS WHEREOF, I have hereunto</p> <p>20 set my hand this 22nd day of November 2017.</p> <p>21</p> <p>22 <i>Robert X. Shaw</i></p> <p>23 ROBERT X. SHAW, CSR</p> <p>24</p> <p>25</p>



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